

**In the Supreme Court of Mississippi
No. 2014-CA-01509**

**Beth Donaldson, Colie Donaldson and Coby Donaldson
Appellants**

Versus

**Dominic Ovella
Appellee**

**Brief of Appellants
(Oral Argument Requested)**

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Certificate of Interested Parties

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

Honorable Lawrence P. Bourgeois, Jr.
Judge, Harrison County Circuit Court

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Appellant/Plaintiff

Colie Donaldson
Appellant/Plaintiff

Coby Donaldson
Appellant/Plaintiff

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Dominic Ovella
Appellee/Defendant

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So certified, this 21st day of May 2015.

s/ Brandon C. Jones .
Brandon C. Jones

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Statement of the Issues Presented

I. Whether res judicata bars the Donaldsons' malicious prosecution claims when the federal district court, in deciding the Donaldsons' motions for sanctions, never adjudicated whether Ovella had a reasonable or honest basis to sue the Donaldsons individually and thus did not determine whether Ovella had probable cause.

II. Whether judicial estoppel bars the Donaldsons' malicious claims merely because the Donaldsons, besides denying personal liability, also filed a counterclaim and a third party complaint.

III. Whether material fact issues exist over whether Ovella lacked probable cause or acted with malice in suing the Donaldsons individually when there is probative evidence Ovella (i) conducted no investigation before suing, (ii) made up and lied about misrepresentations by Colie Donaldson and Coby Donaldson, (iii) sued Beth Donaldson despite her having no material role in the construction project and (iv) was suing the Donaldsons personally to gain leverage in his efforts to avoid paying legitimate bills owed their LLC.

IV. Whether each member of the Donaldson family may have separate counsel when (i) each has a unique and different claim; (ii) Ovella's potential liability to each is different; and (iii) a jury could find each suffered different damages.

Statement of the Case

A. Nature of the case, the course of the proceedings, and its disposition below.

The Court is asked to consider the consolidated lawsuits of Colie, Beth Anne and Coby Donaldson. The claims in question are the Donaldsons' malicious prosecution cases against Dominic Ovella. The Donaldsons have alleged that Ovella instituted his federal lawsuit against them with malice and lacked probable cause before filing suit. The Donaldsons each sued Ovella after Ovella's federal action terminated in their favor.

Ovella has argued, and the trial court has agreed, that the claims of the Donaldsons should be barred on the basis of judicial estoppel and res judicata. In support of this position, Ovella relies on the counterclaims, third party claims, and post-trial request for sanctions offered by the Donaldson at federal court.

In 2010, Ovella sued his homebuilders, B&C Construction, and its officers and employees for Breach of Contract, Negligence, Breach under the New Home Warranty Act under State of Louisiana, alternatively the New Home Warranty Act for the State of Mississippi, Misrepresentation, Unjust Enrichment, Detrimental Reliance, Loss of Use, Mental Anguish, Loss of Enjoyment of Life and any and all damages to be proven at trial. In their answer to Ovella's charges, each of the Donaldsons alleged counterclaims for breach of contract, unjust enrichment, breach of the duty of good faith and fair dealing, intentional infliction of emotional distress and violations of 28 U.S.C. § 1927 and Fed. Rule Civ. P. 11.

After successfully defending their company and themselves during a federal trial, the Donaldson renewed their request for sanctions under 28 U.S.C. § 1927 and Rule 11.

The federal court's order denying the Donaldsons' post-trial motions did not address the merits of their claims but rejected them on procedural grounds. Without referencing the merits of Ovella's lawsuit, the federal court found that because Ovella had paid for the expenses associated with the expert witnesses his attorneys deposed, the law did not permit the court to award additional fees. Regarding the Donaldsons' Rule 11 motion, the court simply found that because the Donaldsons had not complied with the Rule's safe harbor provision, requiring movants to provide a copy of their motion to the opposing party twenty-one (21) days prior to filing, the court could not address the merits of the Donaldsons' request. With respect to the § 1927 claims, the federal court properly stated that these claims were against Ovella's lawyers and that the test for Ovella's attorneys was solely whether the claims were "colorable" in the attorneys' minds at the time they were filed. These claims were similarly dismissed with the court's acknowledgment that the merits of Ovella's claims "were never tested prior to trial."

The state trial court has granted summary judgment on the basis that the Donaldsons are judicially estopped from filing their malicious prosecution claims and further, that these claims are subject to res judicata.

B. Statement of facts relevant to the issues presented for review.

In 2009, Dominic Ovella, a Louisiana construction lawyer and litigator

contracted with B & C Construction and Equipment, LLC to construct a water-front vacation home in Pass Christian.

From his initial conversations with B & C, Ovella insisted he had limited funds and a tight budget to construct and outfit the house. After negotiations over price and work scope, Ovella contracted with B & C to build the house for \$559,000. [R. 400-402].

After construction began, Ovella changed the plans, increasing costs and ultimately exhausting the funds Ovella had borrowed or received from insurers to pay B & C for its work and for furniture, fixtures and equipment for the vacation house. [R. 406-407] Though he was out of money, Ovella induced B & C to keep working by making repeated promises he would soon pay all that was owed. [Supp. R. 26].

In May 2009, the Ovellas moved in to the Pass Christian home. [R. 288] Ovella told B & C he could feel the house sway in high winds so B & C installed bracing under the house. [Supp. R. 36-37]

Over a period of several months, Ovella issued punch lists to B & C for items Ovella desired be changed. As one punch list was done, a new one was issued. Meanwhile Ovella ignored B & C's bills for both the balance of the original contract price and the changes to the work. Eventually, Ovella admits to B & C he had no intention of "paying B & C another f***ing penny." [Supp. R. 39]

In response, B & C retained counsel. In correspondence with B & C's lawyer, Ovella claimed that the house had construction defects. B & C offered to make

repairs if Ovella specified what repairs were specifically needed. [R.418] Ovella never did so and continued to refuse payment.

Early in 2010, Ovella sued B & C over construction and payment issues.

Ovella also sued the owners and officers of B & C. In his Complaint, Ovella alleged that Colie Donaldson (B & C's managing member) and Coby Donaldson (B & C's Vice-President) had committed fraud and that Colie and Coby were liable for any negligent construction work. Ovella also alleged that Beth Donaldson (a member of the LLC not actively involved in B & C's operations), and Colie and Coby, were liable for unjust enrichment.

Ovella's case proceeded to trial. [R. 284-297]. After Ovella presented all of his evidence, each of the Donaldsons moved for judgment as a matter of law. The district court granted their motions. Based on what he heard, the trial judge decided there was not enough evidence of wrongdoing by any of the Donaldsons to permit the claims to continue. [R.484-485]

Ovella's claims against B & C were submitted to the jury for decision and the jury returned a take nothing judgment on all claims against the company. Ovella moved for a new trial. The district court denied the motion. The district court also denied B & C's and the Donaldsons' motion for sanctions. [R.562] Ovella did not appeal concluding the case in favor of the Donaldsons.

On November 13, 2012, each of the Donaldsons sued Ovella for malicious prosecution seeking to recover attorneys' fees and expenses incurred from defending the Ovella Lawsuit and for other harms. [R.228-233; 253-258; 278-283].

Summary of the Argument

Grants of summary judgment are reviewed de novo. In granting summary judgment, the trial court wholly adopted the arguments and proposals of Ovella. This decision should be overturned because 1) the essential requirements of res judicata have not been met, 2) the Donaldsons have not taken inconsistent positions, 3) real fact issues exist regarding the basis for Ovella's individual lawsuits against the Donaldsons, and 4) the Donaldsons are entitled to separate and individual counsel.

The Donaldsons' request for sanctions at the conclusion of the federal case and their claims for malicious prosecution at state court are distinguishable. The former was a request based on the actions taken by Ovella's lawyers in prosecuting their client's case. The latter was based on the fact that Ovella sued the Donaldsons without probable cause. The two actions differ in their nature, elements of claims, and potential remedies. The doctrine of res judicata does not apply.

Summary judgment was granted on the basis the undisputed facts established Ovella had probable cause and acted without malice. But there is substantial probative evidence in the record that Ovella conducted no investigation before suing, lied about misrepresentations by Colie Donaldson and Coby Donaldson, sued Beth Donaldson despite her having no material role in the construction project and sued the Donaldsons personally to gain leverage in his efforts to avoid paying legitimate bills owed their LLC. From this evidence, a jury could find Ovella lacked

a reasonable and honest basis for suit and acted with malice rather than out of a desire to bring wrongdoers to justice.

Each of the Donaldson's malicious prosecution claims are separate with different potential outcomes. This Court has found that such circumstances warrant separate and individual counsel.

Argument

I. Neither res judicata nor collateral estoppel bar the Donaldsons' malicious prosecution claims because the essential requirements of those doctrines were not met. The subject matters and causes of action were not identical and there was no actual adjudication of probable cause after a full and complete evidentiary hearing etc.

As a preliminary matter, it should be noted that under Rule 55, summary judgment would only be proper here if Ovella demonstrated the undisputed material facts established his entitlement to judgment as a matter of law. The Court must reverse unless on de novo review the Court is convinced Ovella met this burden.

In its opinion, the trial court ruled that the Donaldsons' claims are barred by res judicata. This ruling is inconsistent with prior rulings of this Court.

The doctrine of res judicata prevents parties from re-litigating issues tried in a prior lawsuit and prevents litigants from claim-splitting. The doctrine bars parties from litigating claims "within the scope of the judgment" in a prior action. *Anderson v. La Vere*, 895 So.2d 828, 832 (Miss.2004). This bar includes claims that were made or should have been made in the prior suit. *Id.*

As this Court has stated, the doctrine of res judicata “reflects the refusal of the law to tolerate a multiplicity of litigation.” *Little v. V & G Welding Supply, Inc.*, 704 So.2d 1336, 1337 (Miss.1997). “It is a doctrine of public policy designed to avoid the expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibilities of inconsistent decisions.” *Harrison v. Chandler-Sampson Ins., Inc.*, 891 So.2d 224, 232 (Miss.2005).

For res judicata to apply, four identities must be present: (1) identity of the subject matter of the action, (2) identity of the cause of action, (3) identity of the parties to the cause of action, and (4) identity of the quality or character of a person against whom the claim is made. *Hogan v. Buckingham ex rel. Buckingham*, 730 So.2d 15, 17 (Miss. 1998). All four identities must be present on order for res judicata to apply and the absence of any one is fatal to the defense. *Estate of Anderson v. Deposit Guar. Nat'l Bank*, 674 So.2d 1254, 1256 (Miss.1996).

A. Res judicata doesn't apply because the subject and cause of action in this case are not identical to the earlier federal case filed by Ovella.

This Court has defined the first element, “identity of the subject matter of the action”, to mean “the substance of the lawsuit.” *Hill v. Carroll County*, 17 So.3d 1081, 1085 (Miss. 2009). The subject matter of the Donaldsons’ malicious prosecution claims and the subject matter of their request for sanctions were not identical. The subject matter of the Donaldsons’ malicious prosecution claims in the Circuit Court of Harrison County is the actions of Ovella. The subject matter for the

prior motions for sanctions filed in Ovella's federal case was the conduct of Ovella's lawyers in pursuing claims that had no basis under the law.

Other courts have acknowledged the distinction between Rule 11 and malicious prosecution actions noting that the two differ in their nature, elements of the claims, and potential remedies. *Cohen v. Lupo*, 927 F.2d 363, 365 (8th Cir. 1991). Based on these differences, a judicial consensus has emerged that granting or denying a Rule 11 motion is not res judicata to a later filed claim for malicious prosecution. *Lightning Lube, Inc. v. Witco Corp.*, 927 F.2d 1153, 1196 (3rd Cir. 1993); *In re Southmark Corp.*, 163 F.3d 925, 935 (5th Cir. 1999).

The Donaldsons' malicious prosecution claim addresses a different subject and is a different cause of action so res judicata cannot apply.

B. Res judicata doesn't apply because there was no adjudication of the claim or issue after a full and fair opportunity to be heard.

Res judicata only applies where a court has entered a final judgment on the merits. *Miss. Dep't of Human Servs. v. Shelby*, 802 So.2d 89, 95 ¶24 (Miss. 2001). Likewise, a factual issue is precluded only when there has been an actual adjudication of the factual issue after a full and fair opportunity to litigate the issue in the earlier case. *Amwest Mortgage Corp. v. Grady*, 925 F.2d 1162 (9th Cir.1991).

Probable cause requires an honest and reasonable belief that a wrong has been committed. Encyclopedia of Mississippi Law §7. The federal district court did not adjudicate whether Ovella had probable cause to sue the Donaldsons. Likewise, the federal district court did not reach the issues of whether Ovella had an honest belief

or whether he based his claims against the Donaldsons on lies—a story he completely made up and the federal district court made no findings concerning these issues. The district court denied the Donaldsons’ Rule 11 motion against Ovella on procedural grounds. (R. 322) (“The Defendants have not shown that they complied with the safe harbor provision, and their motion for sanctions under Rule 11 will be denied on that basis.”) The federal district court never reached the merits of the Rule 11 motion.

The federal district court denied sanctions against Ovella’s lawyers. But this case is not against Ovella’s lawyers. The question under section 1927 was whether Ovella’s lawyers committed misconduct not whether Ovella lied about the Donaldsons, which is the issue in this case. To adjudicate Ovella’s honesty fairly, the district court would have had to hold an evidentiary hearing, which it did not do. To adjudicate whether Ovella had probable cause, the district court would have had to consider elements it did not have to consider to decide the Rule 11 motion. For that reason, a Rule 11 adjudication does not ordinarily have a res judicata effect on later filed actions for malicious prosecution. *See Amwest Mortgage Corp. v. Grady*, 925 F.2d 1162 (9th Cir.1991) (finding a full and fair adjudication of probable cause had not occurred). *See also Cohen* at 364 (Rule 11 motion “did not decide [whether Complaint] was filed with probable cause, whether [plaintiffs] acted with malice, or the amount of damages [defendant] suffered as a result of [plaintiffs’] misconduct. Those inquiries are irrelevant under Rule 11, but are the sum and substance of the tort of malicious prosecution.”); *Senna v. Gottesdiener*, 1996 WL

176358, at *3 (Conn. Super. 1996) (ruling that under state rule analogous to Rule 11 did not constitute res judicata for later vexatious litigation claim); Norse Systems, Inc. v. Tingley Systems, Inc., 49 Conn.App. 582, 715 A.2d 807, 816 (Conn.App.Ct.1998) (Connecticut trial court refused to rule that probable cause was previously adjudicated in the district court that ruled on a Rule 11 sanctions motion.)

Because the district court never adjudicated whether Ovella had probable cause to sue the Donaldsons individually and did not hold an evidentiary hearing, there was no actual adjudication of the Donaldsons' claim for sanctions.

C. The district court's order did not touch the merits.

Following trial, B&C Construction sought expert witness fees from Ovella. The district court denied this request because only those expert fees incurred at the request of Ovella would be permissible. Finding that Ovella had paid B&C Construction the expenses associated with the three (3) expert depositions requested by Ovella, the court found that no additional expert witness fees were warranted. In reaching this conclusion, the court made no reference to the merit of Ovella's lawsuit—only that the district rule and attending case law did not permit the court to do more.

B&C Construction and the Donaldsons also sought sanctions against Ovella and his attorneys under Rule 11. Citing Rule 11(c)(2), the court denied this request because the safe harbor provision of Rule 11 requires movants to provide a copy of their motion to the opposing party at least twenty-one (21) days prior to filing. Here, the Court found that the Donaldsons "clearly did not comply with the service requirement of the Rule."

To clarify precisely why it was denying the Donaldsons' request under Rule 11, the court added, "The [Donaldsons] have not shown that they complied with the safe harbor provision, and their motion for sanctions under Rule 11 will be denied on that basis." (emphasis added). Again, the court did not mention the merits of Ovella's claims or suggest that its rejection of the Donaldsons' Rule 11 request was anything more than a strict adherence to a technical requirement under the rule.

B&C Construction and the Donaldsons also sought costs and attorneys' fees from Ovella's lawyers under 28 U.S.C. § 1927. On this subject, the court stated, "The relevant inquiry is whether the claims were at least colorable at the time of the [lawyer's] signing of the complaint." (R 323). Again, the court is silent on the merit of Ovella's claims and states that because the claims "were never tested prior to trial", the claims "were at least colorable." (R. 324).

The only portion of the court's order that deals with the substance of the underlying claims comes when the Court notes that parties' experts disagreed about the industry standard. Here, the Court says that the Donaldsons were not entitled to costs or fees for this inconsistency. However, the Donaldsons are not pursuing claims under §1927 and are not pursuing any other manner of claim against Ovella's attorneys in this malicious prosecution claim. B&C Construction and the Donaldsons also sought relief under the court's inherent, general sanctioning power. Without referencing the merits of Ovella's claims, the federal district judge offered a conclusory ruling: "Despite some rough spots in this litigation, the Court does not find sanctionable conduct by any party." (R. 325).

This muted and technical recitation of the law bears no resemblance to Ovella's account of the district court's ruling to the court below.

The federal district court's order dismissing the individual defendants and the unjust enrichment claims is similarly out of keeping with Ovella's narrative that the substance of Ovella's broad allegations were fully vetted by the trial court. With no fanfare and no commentary, the federal district court stated "there was insufficient evidence to support claims against the individual Defendants" and "insufficient evidence to support any unjust enrichment claim by any party." Any effort to expand the court's rulings on these subjects to anything more than a simple conclusory dismissal is not supported by the facts.

D. With res judicata, it's what the court rules not what the parties' argued.

In papers filed with the trial court, Ovella argued that the federal district court "specifically addressed" all of Ovella's claims against the Donaldsons. This is simply not true. While the court refers to the claims Ovella leveled against the Donaldsons and B&C Construction, the court offers no opinion on the validity of these claims or the veracity of the assertions which gave rise to Ovella's allegations of fraud, misrepresentation, detrimental reliance, mental anguish, loss of enjoyment of life, breach of contract, breach of New Home Warranty Act, and unjust enrichment. The Court did not address whether Ovella had probable cause to bring claims against the Donaldsons individually. Nothing in the federal district court Order addresses whether Ovella had an honest belief in his claims or that Ovella had a reasonable basis to support that belief.

Because the federal district court's rulings on those subjects which bear a similarity to the Donaldsons' current malicious prosecution claim were not on the merits, but based on procedural defects, Ovella is not entitled to the protections of res judicata. As held by this Court in *Miss. Dep't of Human Servs. v. Shelby*, res judicata only applies if "a court [has entered] a final judgment on the merits." 802 So.2d 89, 95 ¶24 (Miss. 2001).

It is the court's action that ultimately matters when determining whether res judicata applies. This acknowledgment is missing from the circuit court's opinion. The Circuit Judge also misread *Production Supply Co., Inc. v. Fry Steel, Inc.*, 74 F.3d 76 (5th Cir. 1985). Although *Production Supply* analyzes the res judicata law of California, the basic principles remain. The first factor the *Production Supply* court considered was whether the "prior litigation resulted in a final judgment on the merits." *Id.* at 78. Again, the preliminary consideration for determining whether res judicata applies is whether the underlying court considered the merits, not what the parties argued. The district court never reached the merits of Ovella's probable cause so res judicata and collateral estoppel do not bar the Donaldsons' malicious prosecution claims.

E. *Trilogy Communications* supports reversal

The trial court relied on *Trilogy Communications v. Times Fiber Communications*, a Southern District case which addresses a malicious prosecution claim and unfair competition claim brought on the second day of trial during a patent infringement case. 47 F.Supp. 2d 774 (S.D. Miss.1998). In its opinion, the circuit court adopted Ovella's argument that *Trilogy* stands for the proposition that "the denial of sanctions for the

same conduct alleged in the malicious prosecution case can be utilized in the determination of probable cause whether it is estoppel, res judicata, or not.” (R. 621).

Importantly, the *Trilogy* court said that “[p]robable cause in the context of a malicious prosecution case requires the concurrence of an honest belief in the guilt of the person accused and reasonable grounds for such belief.” *Id.* at 778. The federal trial revealed that at the time of filing suit in federal court, Ovella had no such reasonable belief.

The facts of *Trilogy* were substantially different. The issue in *Trilogy* was complex—patent infringement. There was substantial evidence supporting the *Trilogy* plaintiff’s decision to sue. The plaintiff in *Trilogy* did not overreach by suing individuals for fraud or other made up claims. Because Judge Wingate based his final decision after holding a trial to determine if *Trilogy* had an honest belief in its claims, and because he did not use res judicata to bar the claims, his reasoning supports the Donaldsons’ position.

Finally, the procedural facts in *Trilogy* are not analogous to the present case. First, the *Trilogy* defendant filed a malicious prosecution counterclaim in the middle of a trial—even before they won. *Trilogy Communications v. Times Fiber Communications*, 47 F.Supp.2d 774 (S.D. Miss.1998). Instead of dismissing the counterclaim as premature, Judge Wingate held it in abeyance until the underlying case was concluded in favor of the defendant. *Id.* In *Trilogy*, a jury was selected and trial was conducted. *Id.* It was only after Judge Wingate heard the defendant’s full case—presumably with testimony of the original plaintiff and testing his credibility—that the court decided the defendant

had not proven his malicious prosecution claim. *Id.* After hearing the evidence the court concluded that the original plaintiff had an honest belief in its claim. *Id.* Judge Wingate mentioned he had denied the defendant's Rule 11 claim against the original plaintiff. *Id.*

What is striking about *Trilogy* is that Judge Wingate did not regard the Rule 11 motion as dispositive or res judicata on the malicious prosecution claim. *Id.* Therefore, *Trilogy* supports the Donaldsons', rather than Ovella's position here.

II. Judicial estoppel bars none of the Donaldsons' malicious prosecution claims because the criteria for estoppel established in *Kirk v Pope* weren't met. The Donaldsons did not take inconsistent positions or change their positions. Filing a counterclaim is not inconsistent with denying any liability personally.

Kirk v. Pope, 973 So.2d 981 (Miss. 2007) factors heavily in the trial court's decision. In its order, the court cites *Kirk* "and its progeny" as an indication of this Court's position on the "changing of positions" by a party and as a guidance for applying the doctrine of judicial estoppel to the present facts. *Kirk* involves a plaintiff who initiated and recovered under a breach of contract lawsuit without first reporting the action to the bankruptcy court. The case primarily deals with the issues of standing and parties in interest in a bankruptcy context.

Regarding the doctrine of judicial estoppel, the Circuit Court restated the Fifth Circuit's test: "(1) the party is judicially estopped only if its position is clearly inconsistent with the previous one; (2) the court must have accepted the previous positions; and (3) the nondisclosure must not have been inadvertent." *Superior Crewboats, Inc. v. Primary P&I Underwriters*, 374 F.3d 330, 335 (5th Cir. 2004).

Under the first requirement, the Court found that Kirk's failure to list his breach of contract lawsuit on his bankruptcy schedules was tantamount to a representation that no such lawsuit existed and inconsistent with his subsequent pursuit of the claim. *Kirk* at 991. Under the second requirement, the Court found that the bankruptcy court's reliance on Kirk's schedules marked its reliance of Kirk's previous position. *Id.* Under the final requirement, the Court found that Kirk's non-disclosure could not be inadvertent because in a bankruptcy setting non-disclosure can only be inadvertent where the debtor "either lacks knowledge of the undisclosed claims or has no motive for their concealment." *Id.*

The circuit trial court's holding is that the Donaldsons are judicially estopped from making their malicious prosecution claims on the basis the Donaldsons "changed their positions." Thus, the Court reasoned they took an inconsistent position by making individual counter-claims in the original lawsuit against Ovella and later asserting the corporate shield in their malicious prosecution claims. (R. 620).

The current facts meet none of the *Kirk* requirements for judicial estoppel. The first prong requires that a party take a position inconsistent with a prior position. In the original district action, Ovella sued B&C Construction and Equipment, LLC and the Donaldsons as individuals. In their answers to that suit, the Donaldsons alleged that they "were acting in the course and scope of their employment with B&C Construction, LLC" and that Ovella's Complaint contains "no facts or allegations justifying the claims against the individual defendants." (R. 172, 175.)

This entirely follows the complaint filed in the underlying malicious prosecution lawsuit where the Donaldsons allege that Ovella's original claims against the Donaldsons were made "without probable cause and for malicious purposes including harass[ment] and coerc[ion] causing [them] financial hardship, and retaliating against [them] for actions taken by others." (R.15).

Assuming that the circuit trial court's finding that the Donaldsons "changed their position" by alleging that they were employees of B&C Construction while also answering and alleging counter-claims on behalf of themselves as individuals, this is a flawed interpretation of the judicial estoppel test. Fed.R.Civ.P. 13 requires that counterclaims be filed at the time of service [of the original complaint], making it common practice to cover all potential bases in response to initiating pleadings. The thrust of the pleadings in both matters is the same.

The Donaldsons' contention is and always has been that Ovella acted with malice when he sued individual employees of B&C Construction besides the company. That the Donaldsons were officers or employees of the company with whom Ovella had a contractual relationship is precisely why it was harassing and unnecessary for him to sue both the company and the Donaldsons individually.

The second prong requires that the court accept the parties' previous position. In *Kirk*, this requirement was satisfied because the bankruptcy trustee and court relied on the plaintiff's schedules in granting his discharge from bankruptcy. No such reliance exists here. First, the Appellants have not staked out different positions. Second, the Donaldsons' counterclaims caused no confusion at the district

court. Because they were sued as individuals in the federal court action, the Donaldsons defended the allegations made against them and made certain compulsory counterclaims. They did this while maintaining that at all times relevant to the Ovella Complaint any actions taken regarding the Ovella construction project were taken as employees or members of B&C Construction. This is completely consistent with the position the Donaldsons took in their malicious prosecution claims. Other courts have found that where there is no judicial acceptance of an alleged inconsistent position, application of judicial estoppel is unwarranted because no risk of an inconsistent result exists. *In re Oparaji*, 698 F.3d 231 (5th Cir. 2012).

The third requirement for applying judicial estoppel is that the nondisclosure of the prior inconsistent position not be inadvertent. Because there has been no misdirection or inconsistency whether intentional or otherwise, the facts do not meet this requirement either.

This Court has recently addressed judicial estoppel. See *Booneville Collision Repair, Inc. v. City of Booneville*, 152 So.3d 265 (Miss. 2014). In *Booneville*, the Court held that to find judicial estoppel, it is essential that the estopped party benefited from the inconsistent position earlier in the litigation. *Id.* at 274-5.

This is not the case here. Even assuming that the Donaldsons' decision to make counterclaims when initially sued amounted to an "inconsistent position," it was of no benefit to them. The Donaldsons' counterclaims in the federal case were summarily denied by the district judge. (R. 197,200).

The Circuit Judge erred in finding that the doctrine of judicial estoppel applied to the Donaldsons' malicious prosecution claims against Ovella.

III. Material fact issues exist over whether Ovella had probable cause (a reasonable basis and an honest belief) to sue the Donaldsons individually and whether he acted with malice (to bring a wrongdoer to justice or to coerce the Donaldsons into surrendering B & C's claims) which precluded summary judgment on the merits.

In his Complaint, Ovella claimed that Colie and Coby Donaldson made misrepresentations to him and committed fraud. To establish fraud under Mississippi law, Ovella had to show by clear and convincing evidence: (1) a misrepresentation of fact, (2) its materiality, (3) the speaker's knowledge of its falsity or ignorance of its truth, (4) the speaker's intent to deceive, (5) the hearer's ignorance of its falsity, (6) his reasonable reliance on its truth, (7) his right to rely thereon, and (8) his consequent and proximate injury. A claim of fraud may not be based on actions to take place in the future - that is a promise, unless the promise was made with a present undisclosed intention of not performing it. Trying to satisfy element (1) Ovella testified that Colie Donaldson and Coby Donaldson represented to him (a) the house—built on wooden columns over 18 feet in the air-- would be sway-proof; it would not sway or move in the wind, and (b) that the wood columns for the house would be 12x12. Colie and Coby Donaldson's testimony contradicted Ovella's, creating a swearing match. Colie and Coby testified they told Ovella he would not feel excessive movement in the wind—that is, the house would be sway resistant, not sway proof. They also testified that Ovella had directed them to change the columns of the house that resulted in the change from 12x12 to 10x10

columns. Of moment, when Ovella was cross-examined he admitted that he had ordered B & C to change the columns and that he had been told by an engineer during construction that any house on stilts would move some in the wind. On the evidence, a jury could conclude that Ovella had no honest or reasonable basis for claiming fraud or misrepresentation -- and that he made up the fraud claim.

Ovella conducted no investigation prior to suing. Ovella asked no engineer whether his house swayed excessively. He winged it.

Leaving aside the swearing match, Ovella had no reasonable legal basis for his fraud claim. No representation of fact was made. (Element 1).

Credibility determinations are for the jury not the court. On a motion for summary judgment, the Court must accept the Donaldsons' testimony as true. In *Anderson v. Liberty Lobby, Inc.*, the Supreme Court explained that, in considering a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 477 U.S. 242 (1986).

B & C was organized under the Limited Liability Company Act, which shields or immunizes the members of the company from contract or tort liability for the actions and obligations of B & C: "Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company, and no member, manager or officer of a limited liability company shall be obligated personally for such debt, obligation or liability of the

limited liability company solely by reason of being a member, acting as a manager, or acting as an officer of the limited liability company.”

When he sued the individuals, Ovella had no evidence that any of the actions he was basing his lawsuit on were outside the activities undertaken by B & C. There was no basis alleged for seeking to pierce the immunity afforded by the limited liability company law.

Ovella had no factual basis to allege that any of the Donaldsons agreed to accept responsibility or were legally responsible to him for any negligent construction work or breach of the construction contract by B & C or negligent misrepresentations about the work made on behalf of B & C. Thus, there was no reasonable basis in law or fact for Ovella to believe he was entitled to a judgment against any of the individual Donaldsons for any defective work.

Ovella also alleged that Beth Donaldson, Colie Donaldson, Coby Donaldson, and B & C were liable to him on a claim of unjust enrichment, an equitable remedy that lies only when (1) there is no legal contract, (2) the defendant received a benefit, (3) at the plaintiff's expense, (4) which in good conscience and justice the defendant should not retain because it was, in practical effect, the result of a mistaken payment.

Stated slightly differently, unjust enrichment claims require evidence there is no legal contract and the person against whom the claim is made possesses money he should not retain and in good conscience he should deliver to another.

A jury could readily conclude Ovella had no reasonable basis in law or fact to believe in good faith that any of the individual Donaldsons were liable for unjust enrichment. First, Ovella made payments only to B & C, and he made those payments under his contract with B & C. The existence of the contract precluded an unjust enrichment claim as noted by the district court when he dismissed this claim. (R.76). Ovella had not a scintilla of evidence to support a belief that the Donaldsons were unjustly enriched.

Second, Ovella also had absolutely no evidence in his possession that any of the Donaldsons had received benefits from the payments he made to B & C. Had he investigated before suing, he would have learned that B & C had made no profit over and above its expenses in performing its contract with Ovella.

Finally, the Donaldsons had immunity under the limited liability company statute for liability for unjust enrichment. Because Ovella did not have reasonable grounds to believe the Donaldsons were unjustly enriched, he did not have probable cause to sue them.

IV. Each of the Donaldsons is entitled to separate and individual counsel.

The Donaldsons seek to hold Dominic Ovella liable for malicious prosecution. The claims arise out of the same suit but each claim is also separate. Stated differently, Ovella's potential liability to each of the Donaldsons is different. A jury could find Ovella liable to Colie Donaldson for malicious prosecution yet also decide Ovella is not liable to Beth Donaldson or Coby Donaldson. If a jury found Ovella

liable to all three Donaldsons, the jury may find each suffered a different type or amount of damages.

Because each plaintiff has a different claim, each may have separate counsel. This Court so held in *Dooley v Byrd*, 64 So.3d 951 (Miss. 2011) and *Long v. McKinney*, 897 So.2d 160 (Miss. 2004). Those cases, like this case, involved consolidated proceedings. *Dooley* and *Long* involved claims for wrongful death. By law, wrongful death cases must be tried in a single consolidated proceeding. But even though the claims were consolidated, each plaintiff was entitled to separate counsel and each plaintiff and his separate counsel was entitled to fully participate in the trial.

While Colie Donaldson believes Ovella liable to the other members of his family, he recognizes it is impractical for his attorney to present the other family members' claims. Imagine counsel having to stand up and say to the jury—"ok, members of the jury, that concludes the case for Colie, I will take off my Colie Donaldson hat now, and put on my Beth Donaldson hat, and tell you about what Ovella separately did to her." If a single attorney represented all the Donaldsons at trial, the jury is more likely to see one claim as rising or falling on the outcome of the other's claims. By way of analogy, two defendants in a case in which they are accused of conspiring to commit a crime may agree they did not do so, but one counsel appearing for both would create an appearance before the jury they are in cahoots even if they are not.

In his federal court case, Ovella did not allege that Beth Donaldson had ever uttered a word to him, that she had ever swung a hammer at a nail, or even that

she had ever been on the job site. The claims against Beth Donaldson and the defenses she had to those claims were materially different from Colie and Coby Donaldson's defenses. Her claim for malicious prosecution is different and possibly stronger than that of her husband and son. At a minimum, Beth Donaldson was entitled to separate counsel, which she was denied by the Circuit Judge.

Conclusion

For the reasons explained above, Appellants request that the judgment of the Circuit Court of Harrison County, the Honorable Lawrence P. Bourgeois, Jr., be reversed and this matter be remanded to the lower Court.

Respectfully submitted, this 21st day of May, 2015.

s/ Brandon C. Jones
Brandon C. Jones

Certificate of Service

I certify that I have this day caused to be filed via the Mississippi Electronic Court a copy of the above and foregoing Appellee's Response Brief which forwarded a copy of such filing to:

Honorable Lawrence P. Bourgeois, Jr.
Judge, Harrison County Circuit Court

Dee Aultmann
Attorney for Appellee/Defendant

So certified, this 21st day of May 2015,

s/ Brandon C. Jones
Brandon C. Jones